



## Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006

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## Customs Legislation Amendment (Augmenting Offshore Powers and other Measures) Bill 2006

**Date introduced:** 7 December 2006

**House:** House of Representatives

**Portfolio:** Justice and Customs

**Commencement:** Sections 1 to 3 commence on Royal Assent. Schedules 1 to 4 commence at various times as noted in the relevant descriptions in the background section of this Digest.

### Purpose

Schedule 1 of the Bill will amend the *Customs Act 1901* (the Customs Act) to provide for changes to the powers of search and seizure available to customs officers in the offshore environment.

Schedule 2 will amend the Customs Act to update brokers licensing provisions to accommodate locum customs brokers who can then be employed by a number of different corporate customs brokers at any one time.

Schedule 3 of the Bill proposes amendments to the Customs Act in response to the decision in *Malika Holdings Pty Ltd v Stretton (2001) 204 CLRL 290* ('Malika') to put the time available to recover customs duty beyond doubt and modernise the duty recovery provisions.

Schedule 4 amends the Customs Act to provide that a statement or declaration made is taken to be a statement made to the Chief Executive Officer of Customs.

### Background

The amendments proposed in the Bill address differing policy imperatives.

Search and seizure powers of customs officers in the offshore environment.

The Minister's second reading speech states that the provisions relating to search and seizure are to ensure:

the personal safety of the officers in exercising their enforcement functions, help prevent the escape of any person detained as a suspect, and help prevent the disposal of evidence.<sup>1</sup>

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The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 7 December 2006 and the Committee reported on 8 February 2007. Several [submissions](#) were received by the Committee, including from Australian Customs Service (ACS) who also had representatives appear before the Committee hearings.

The ACS submission provides more detail on the rationale for the extension of search and seizure powers contained in the Bill. In response to a question by Senator Ludwig on the general nature of search and seizure powers under the Act, ACS responded in writing that:

The amendments in this Bill are to powers available to officers in the unique circumstances that occur in the offshore environment after making a request to board a ship under section 184A or to land for boarding an aircraft under section 184D of the Customs Act. This usually occurs where the commander of a Commonwealth ship or aircraft has formed a view that there is a suspected contravention of an offence under the Customs Act, Division 307 of the Criminal Code or another Act.<sup>2</sup>

In its written submission to the Committee<sup>3</sup>, ACS documented recent examples of escalations in the level of resistance encountered when Customs have boarded vessels ‘suspected of contraventions of the Customs Act’ or other legislation. The ACS submission outlines the concerns of officer safety and risk to evidence being destroyed as the main driving factors for these amendments:

...an incident occurred during a boarding of an Indonesian fishing vessel located inside the Australian Exclusive Economic Zone. The team began to conduct an investigative boarding to determine if there was evidence of any offences. *As a decision had not been made to detain the vessel*, physical pat down searches were unable to be conducted. During the search of the vessel an Indonesian crew member produced a weapon and physically threatened the boarding team. A tactical withdrawal occurred to avoid physical injury to any Customs officers.

During another recent boarding of an Indonesian fishing vessel, the Customs boarding team identified sufficient evidence for the vessel to be detained and escorted to port for further enquiries. Subsequent pat down search of the crew located a concealed Global Positioning Satellite in the trousers of a crew member. There was potential for this piece of evidentiary material to be disposed of from the time of boarding until the search finally took place once the vessel had been detained. *If no other evidence of suspected offences had been identified, it would not have been possible to detain the vessel and conduct the searches and the GPS would not have been located.* [emphasis added]

Currently, there a number of requirements that must be satisfied before a ‘pat down’ search of persons can take place. Essentially these are:

- that the ship may be boarded under subsection 185(1)
- that ship may be detained under subsection 185(3).

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In case of Australian ships, there appears to be no requirement that the ship is suspected of a contravention of Australian law before it can be boarded: see paragraph 185(1)(c). Once boarded, an Australian or foreign ship can only be 'detained' under subsection 185(3) if there is a reasonable suspicion of a contravention of Australian law. The proposed amendments will, amongst other things, do away with the requirement to detain a ship before searches be made under section 185AA. Thus they will allow any person on an Australian ship that is boarded to be subject to a personal search, notwithstanding that there may be no reasonable suspicion of the ship being involved in a contravention or that the person themselves has been involved in a contravention. ACS goes on to note:

It is recognised that the proposed personal search powers are wider in scope than other personal search powers under Commonwealth legislation. This is due to the remote locations in which offshore patrols are conducted and the unique circumstances facing officers when conducting personal searches in confined spaces.<sup>4</sup>

Concerns were expressed by Queensland Council of Civil Liberties and the ACT Director of Public Prosecutions on the aspects of the Bill authorising Customs officers to carry out personal searches without a warrant and the ambit of the immunity granted to officers and other persons acting on their direction. Both submissions raised the point that the circumstances of the provisions do not require that there be any suspicion or belief that any offence is or may have been committed.

The Police Federation of Australia (PFA) made a submission to the effect that the PFA did not consider that the additional powers proposed to be granted to Customs officers would encroach unduly into the professional domain of policing.

The Senate Standing Committee for the Scrutiny of Bills has recently reported on Entry Search and Seizure Provisions in Commonwealth Legislation<sup>5</sup> ([Twelfth Report, 2006](#)). The scope of this Inquiry was to examine and review the Government's responses to the Committee's previous report on entry and search provisions, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*.

The Twelfth Report, 2006 discusses the 'national security' justification for these measures and notes that the powers are consistent with other national security law. The discussion is in the framework of the *Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004* and the Report notes:

The Minister advised that the purpose of the powers is to protect Customs officers and prevent the destruction of evidence when a person is suspected of having committed a serious Commonwealth offence, is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that a person not depart Australia. The Minister also advised that Customs officers already have broad personal search powers under the *Customs Act 1901* and receive extensive training in relation to this aspect of their operational activity.<sup>6</sup> The Committee noted that its consideration of the bill would have been assisted by the inclusion of this explanation in the explanatory memorandum. The Committee also stated that it continues to have concerns with

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personal search provisions as they may be considered to trespass on personal rights and liberties.

The [Explanatory Memorandum](#)<sup>6</sup> has further background on the proposed provisions and according to the description on the amending provisions, the ship being boarded is a ship *suspected of being involved in offences* against specified Acts. It states that the amendments ensure the safety of Customs officers from possible attack while investigating ships ‘suspected of offences’ against the specified Acts as well as preventing the possibility of evidence of an offence being thrown overboard, although as discussed above it appears that in the case of Australian ships there is no requirement for any such suspicion.

The Senate Standing Committee on Legal and Constitutional Affairs tabled its [Report](#) on the Bill on 8 February 2007. The Committee accepted ACS’s evidence that the powers are necessary as an adjunct to the proposed search and seizure powers and that the retaining of evidence ‘was not likely to occur where no suspicion of the commission of an offence was present prior to a search being conducted.’<sup>7</sup>

The Committee made 4 recommendations, 2 of which require amendments to the Bill. The first picks up a submission from the ACT Director of Public Prosecutions, Mr Refshauge SC, to protect legal professional and other privileges when the search and seizure powers are exercised, and the second recommends a review of Schedule 1 of the Bill within 3 years by the Commonwealth Ombudsman.

Amendments to Schedule 1 Part 1 commence on the 28<sup>th</sup> day after Royal Assent.

### Employment arrangements for customs brokers

In the case of broker’s licences held by corporations or partnerships, that licence must, amongst other matters, specify those persons who may act as nominees for the licence holder and the places where the various nominees may act as a customs broker. To be eligible to be a nominee a person cannot be the nominee of another customs broker. According to the Explanatory Memorandum, corporate customs brokers are increasingly employing locum or freelance customs brokers who can be employed by a number of different corporate customs brokers, but such locums cannot act as nominees for more than one corporate broker by virtue of paragraph 183CD(1)(f). Accordingly, the paragraph is being repealed.

To avoid the unduly restrictive nature of section 183CD (1)(j), the policy has been adopted of declaring ‘all places in the Commonwealth’ as places where licensed brokers can practise. Accordingly this condition has become obsolete and is being repealed.

Amendments to Schedule 2 commence on the day of Royal Assent.

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## Duty Recovery

The amendments being made in Schedule 3 of the Bill are to overcome the High Court decision of *Malika*. That decision held that the 4-year time limit within which Customs may recover customs duty only applied if the under payment of duty or the overpayment of a duty rebate etc was due to a Customs error. However, as a matter of policy, Customs applies the 4-year time limit to all duty recovery, other than in cases of fraud, whether or not there is a customs error. The proposed amendments seek to bring the Act into line with this policy by placing a 4-year time limit on all duty recovery other than in cases of fraud or evasion. Further discussion of these amendments and details can be found in the [submission](#) to the Committee by ACS and the [Explanatory Memorandum](#) to the Bill.

## Making false or misleading declarations when using the electronic SmartGate passenger processing system.

Schedule 4 makes amendments that will effectively broaden the scope of the offence of making a false or misleading statement by providing that information given to Customs under section 71 is taken to be a statement made to the 'CEO'. According to the Explanatory Statement this is in anticipation of the automated passenger processing system known as SmartGate in early 2007 – thus persons entering false or misleading statements into the automated SmartGate system will be committing an offence. The Explanatory Statement<sup>8</sup> also outlines proposed amendments to the *Customs Regulations 1926* regulation 41.

Schedule 4 commences 28 days after the day of Royal Assent.

## Financial implications

None are identified in the Explanatory Memorandum.<sup>9</sup>

## Main provisions

### Schedule 1 – Search and Seizure powers of customs officers in the offshore environment

**Items 1 and 2** make amendments to the definition of 'frisk search' by repealing the existing definition in section 4 of the Act and replacing it with the definition in existing subsection 183UA(1). Subsection 183UA(1) is repealed and the new definition in section 4 will apply to the whole of the Act. A frisk search will be a search of a person conducted by quickly running the hands over the person's outer garments, and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person (being searched). This definition is the same definition found in the *Crimes Act 1914*.

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**Item 16** inserts **new subsection 219M(1A)** to provide an explicit power to conduct a frisk search under section 219M. The rationale for this amendment is set out in the Explanatory Memorandum:

Existing section 219M sets out the manner in which a frisk search of a person detained under section 219L is to be conducted. However, although the power to conduct such a search is implied on the reading of sections 219L and 219M, there is no explicit power in either section to conduct a frisk search. 76. Item 16 inserts new subsection 219M(1A). New subsection 219M(1A) provides an express power for a Customs officer to conduct a frisk search on a person detained under section 219L for purpose of determining if the person is unlawfully carrying prohibited goods

Currently, the apparent purpose of a section 219M frisk search is to search for weapons or anything that could be used bodily injury: paragraph 219M(4)(a). However, this paragraph is being repealed by **item 17**. **Item 16** inserts a new purpose which, as mentioned above, focuses on prohibited goods.

Existing section 185 of the Act sets out officers powers to board and search a ship or aircraft in the circumstances set out in the provision and allows officers to do such things as secure goods, require persons to answer questions and produce documents, make copies of documents, and make an arrest, without warrant, of any person on the ship or a aircraft if there is a reasonable suspicion that an offence has been committed or may be committed by that person. **Item 3** inserts **new paragraphs 185(2)(cb) and (cc)** and expands the powers by providing that officers may take possession of any goods found and documents produced and retain such goods or documents. **New subsection 185(7)** inserted by **item 6** sets out the circumstances when the goods or documents found or produced under **new subsections 185(2)(cb) and (cc)** ‘may afford evidence of the commission of a relevant offence’.

**Item 8** repeals existing subsections 185AA(1),(2) and (3) and inserts **new subsections 185AA(1)-(3C)**. The key amendment is that the existing requirement that the ship or aircraft firstly has to be detained before the search powers can be exercised has been removed (in conjunction with the amendments in **items 13 and 14**, below). The amendments also change the circumstances under which the powers may be exercised. **New subsections 185AA(3),(3A),(3B) and (3C)** empower officers (and in some cases non-officers) to examine things or documents found, and to take possession of and retain weapons, documents or things that are found.

**Item 9** repeals and substitutes a new version of **subsection 185AA(6)** to extend the existing immunity from civil or criminal suit for a person who exercises powers at the request of an officer under section 185AA, to now also include an officer who conducts a search under the section, if the person or officer acts in good faith and does not breach existing subsection 185AA(7) (use of force and maintaining a person’s dignity).

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**Item 10** inserts a new provision, **subsection 185AA(7A)** to make clear that evidence obtained under section 185AA can be used for the investigation and/or prosecution of an Commonwealth, State or territory offence. However, any possible use of such evidence would still be subject to any State law regarding evidence in proceedings for an offence against the law of the relevant State.

**Item 11** extends the definition of ‘officer’ in **new subsection 185AA(8)** to reflect that the new search powers apply in respect of vessels and/or aircraft boarded under either section 185 or section 185A, rather than just under existing section 185.

**Item 12** extends the meaning of a ‘person found on a ship or aircraft’ to include a person suspected on reasonable grounds to have landed from or left the ship or aircraft. As section 185AA relates only to searches of people it does not need to also include ‘goods’ as in the similar provisions in section 185(6) and on which this clause is based.

**Items 13 and 14** repeal subsections 219L(1B) and (1C). These provisions currently require the detention of person before a frisk search can be undertaken in the circumstances of a ship or aircraft being boarded under the powers contained in section 185. The new provisions **subsections 185AA(1) and (1A)** allow for a wider search than a frisk search (removal of garments for example) and also cover the same circumstances of the subsections to be repealed and therefore make the subsections obsolete. The effect of the amendments will be that section 219L will only provide for the frisk search of a person who has been detained. The amendment in **item 16 new subsection 219M(1A)** puts back the requirements that if a person is detained, an officer of customs may carry out a frisk search ‘to determine whether the person is unlawfully carrying prohibited goods’ and to recover any goods found which are to be removed from the definition of ‘frisk search’ in **items 1 and 2**. Note that this does allow any other person to conduct the search other than an officer of customs.

The Explanatory Memorandum<sup>10</sup> also points out that sections 219L and 219M do not have an explicit power to conduct a frisk search, so one of the purposes of **new subsection 219M(1A)** is to provide for an express power for a Customs officer to conduct such a search. This raises the issue whether convictions to date based on these provisions and evidence obtained there under could be in doubt.

### Schedule 3 - Recovery of duty

**Item 1** repeals section 153 of the Act which provides that amounts owed are Crown debts which are payable by the owner of the goods and recoverable at any time in proceedings in the name of the Collector. Section 153 is no longer needed as the provision is replicated in **new section 165**, inserted by **item 4** of the Bill.

**Items 4 and 5** repeal and substitute existing section 165 with **new sections 165 and 165A** to ensure that any duty that is due and payable and an amount of drawback, refund or rebate of duty that is overpaid to a person is a debt due to the Commonwealth, and is

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payable either by the owner of the goods (in the case of any duty) or the person who is overpaid. The concept of error currently in section 165 – see discussion in the background section of this Digest - is removed in the new provisions.

**New subsection 165(5)** provides that a demand for payment by the CEO must be made within 4 years of the triggering event unless the CEO is satisfied that the debt arose as the result of fraud or evasion.

**New subsection 165A** allows the CEO to apply a notional amount of refund, rebate or drawback in respect of goods against the duty payable on the same goods and details of how the provision works with an example can be found in the Explanatory Memorandum.<sup>11</sup>

The amendments made in **items 6-10** make various amendments including amendments of a technical nature to the payments under protest regime with an intention of replacing them with requirements that are general in nature and easier to comply with. Details of the provisions can be found in the Explanatory Memorandum.

**Item 11, and Part 2, items 12-15** make transitional and application amendments as a consequence of amendments proposed in the Bill.

#### Schedule 4 - Treatment of certain information given to Customs

**Item 1** of Schedule 4 amends section 234 to add **new subsection 234(2BC)** which will have the net effect that, in the circumstances covered by section 71AAAB, information provided to Customs pursuant to section 71 of the Act is taken to have provided to the CEO. This means that airline passengers and aircrew making electronic declarations about their personal or household goods using the proposed SmartGate system are deemed to be making statements to an officer of Customs for the purposes of paragraph 234(1)(d). Consequently, a person making a false or misleading declaration using the SmartGate system may be prosecuted for an offence against paragraph 234(1)(d), which carries a maximum penalty of 100 penalty units (\$11 000).

## Endnotes

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1. Second reading speech on the Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill 2006, p.2.
2. Question on Notice to the Australian Customs Service, answer to question 2, p. 2.
3. Australian Customs Service, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Customs Legislation Amendment (Augmenting offshore Powers and other Measures) Bill 2006*, January 2007, paragraph 4, p. 2.

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4. Australian Customs Service, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Customs Legislation Amendment (Augmenting offshore Powers and other Measures) Bill 2006*, January 2007, paragraph 9, p. 3.
5. Senate Standing Committee on the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, 12<sup>th</sup> Report, 4 December 2006.  
<http://www.aph.gov.au/senate/committee/scrutiny/entrysearch/report/report.pdf> accessed on 9 February 2007.
6. <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/ems/Linked/07120614.pdf>
7. Senate Committee on Legal and Constitutional Affairs, *Customs Legislation (Augmenting Offshore Powers and Other Measures) Bill 2006[Provisions]*, February 2007, paragraph 3.60, p. 27. Discussion of this issue can be found at paragraphs 3.31-3.35 of the [Report](#).
8. Explanatory Memorandum, *Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill*, paragraphs 150–153, p. 28.
9. Explanatory Memorandum, paragraph 2, p. 2.
10. Explanatory Memorandum paragraphs 75 and 76, p. 13.
11. Explanatory Memorandum, paragraphs 111–116, pp.20–21.

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